

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42113

ARIZONA ELECTRIC POWER COOPERATIVE, INC.

v.

BNSF RAILWAY COMPANY AND  
UNION PACIFIC RAILROAD COMPANY

Digest:<sup>1</sup> The Board finds that changed circumstances justify reopening this proceeding. Pending a final decision, the parties have agreed to maintain the current rate prescriptions.

Decided: January 20, 2012

The Board concludes that changed circumstances relating to the 2010 purchase of BNSF Railway Company (BNSF) by Berkshire Hathaway Inc. (Berkshire) justify reopening this proceeding. On March 31, 2011, pursuant to 49 C.F.R § 1241.11(a), BNSF submitted to the Board its Class I Railroad Annual Report for the year ending December 31, 2010, which reflects an increase in BNSF's net investment base attributable to Berkshire's purchase of BNSF. This increase in BNSF's net investment base is likewise reflected in the recently released Uniform Railroad Costing System (URCS) data for calendar year 2010. Whether we should exclude the increase in BNSF's investment base from BNSF's URCS data is an issue that is currently under review in a separate docket. See W. Coal Traffic League—Petition for Declaratory Order, FD 35506 (STB served Sept. 28, 2011). Because the outcome of that issue could affect the rates charged under the rate prescriptions in this case, we are reopening this proceeding and holding it in abeyance, on a limited basis, until the issue in FD 35506 is resolved.

BACKGROUND

In 2008, Arizona Electric Power Cooperative, Inc. (AEPCO), filed a complaint challenging the reasonableness of the joint rates established by BNSF and Union Pacific Railroad Company (UP) (collectively, defendants) for unit train coal transportation service from New Mexico and the northern portion of the Powder River Basin in Wyoming and Montana to AEPCO's Apache Generating Station located near Cochise, Ariz. In a decision served on November 22, 2011, the Board found that AEPCO had shown that defendants have market

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

dominance over those movements, and that their rates exceeded the level defendants needed to charge to earn a reasonable return on the full replacement cost of the facilities used to serve AEPCO. Ariz. Elec. Power Coop. v. BNSF Ry., NOR 42113 (STB served Nov. 22, 2011) (November 2011 Decision). Accordingly, the Board ordered defendants to reimburse AEPCO (with interest) for amounts previously collected above prescribed levels. Id. at 39. The Board further ordered defendants to establish and maintain rates for movements of the issue traffic that do not exceed 180% of the variable costs of providing the service. Id.

On May 2, 2011, the Western Coal Traffic League (WCTL) filed a petition pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721 asking the Board to adjust BNSF's URCS costs for 2010 and subsequent years so as to exclude the write-up in BNSF's net investment base attributable to the difference between the book value and the price that Berkshire paid to acquire BNSF in 2010, and to make corresponding changes in BNSF's annual URCS depreciation calculations. On September 28, 2011, the Board instituted a proceeding to consider the issues raised in WCTL's petition. W. Coal Traffic League—Petition for Declaratory Order, FD 35506, slip op. at 1 (STB served Sept. 28, 2011). On December 9, 2011, the Board advised parties with BNSF rate prescriptions in effect in January 2012 that, if they believed the Board should temporarily lift the prescriptive effect of their 2012 rate prescriptions pending final resolution of the issues in Western Coal Traffic League, Docket No. FD 35506, they should petition the Board to reconsider or reopen relevant Board decisions. W. Coal Traffic League—Petition for Declaratory Order, FD 35506, slip op. at 2 (STB served Dec. 9, 2011). In response, AEPCO filed a petition on December 20, 2011, in which it requested that the Board reopen this proceeding so that rates can be adjusted accordingly should the Board determine that BNSF's URCS costs should not reflect some or all of the acquisition premium.<sup>2</sup>

## DISCUSSION AND CONCLUSIONS

We will reopen this proceeding and temporarily lift the prescriptive effect of the rate prescriptions in this case. Pursuant to 49 U.S.C. § 722(c), the Board may reopen a case upon a showing of “material error, new evidence, or substantially changed circumstances.” We conclude that the increase in BNSF's net investment base resulting from the Berkshire purchase, as well as our consideration of whether that increase should be excluded from BNSF's 2010 URCS data, constitutes “substantially changed circumstances” that could materially affect the rates charged under the rate prescriptions set forth in the November 2011 Decision.

While we find that reopening this proceeding is warranted, the further step of vacatur is unnecessary. In a stand-alone cost (SAC) case, if the Board concludes that reopening is justified, it must then consider whether the rate prescription should be vacated because either: (a) reasonable grounds for investigation of the rate under 49 U.S.C. § 11701(b) no longer exist, or (b) the factual underpinnings of the prior SAC analysis and the resulting rate prescription have been undermined to such a degree as to render the existing SAC analysis inadequate. Major

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<sup>2</sup> On January 9, 2012, AEPCO filed a petition seeking a Board order requiring defendants to publish a joint rate in accordance with the November 2011 Decision. That petition will be addressed in a separate Board decision.

Issues in Rail Rate Cases, EP 657 (Sub-No. 1), slip op. at 69-70 (STB served Oct. 30, 2006). Here, we still have reasonable grounds for investigation and the factual underpinnings of the prior SAC analysis have not been undermined.

Our ordinary practice established in Major Issues regarding reopened SAC cases would be: (a) to direct the railroad to maintain its current rates for shipments involving the issue traffic; and (b) for movements taking place during this reopening period, to order that any difference between the revenue received under the rates charged and revenue that would have been generated during the reopening period under the rates prescribed in our final decision must be refunded, with interest calculated pursuant to 49 C.F.R. § 1141.1, to the party entitled to receive it. Major Issues, slip op. at 70. The first step is unnecessary in this case, however, as AEPCO states that the parties have agreed that “[defendants] will not charge more than the jurisdictional threshold calculated based on inclusion of the acquisition premium” pending a final decision in this reopened proceeding.<sup>3</sup> As such, here we need only follow the second step of our normal process. Each party will be instructed to keep account of the amounts paid during the pendency of the reopening, and to make the other party/ies whole with respect to the amounts paid during the interim, including if the Board ultimately determines that the increase in BNSF’s net investment base should be excluded from BNSF’s URCS, in Western Coal Traffic League, Docket No. FD 35506.

Furthermore, we will hold this proceeding in abeyance, regarding the issue raised in the petition to reopen only, pending final resolution of the issues in Western Coal Traffic League, Docket No. FD 35506. Our decision in that case regarding whether the increase in BNSF’s net investment base resulting from the Berkshire purchase should be excluded from BNSF’s URCS data will impact the question of whether the rate prescriptions in this proceeding should be reevaluated.

It is ordered:

1. This proceeding is reopened.
2. The prescriptive effect of the prior rate order is temporarily lifted. Each party is instructed to keep account of the amounts paid during the pendency of the reopening—in accordance with the parties’ agreement—and to make the other party/ies whole, at the conclusion of this reopening, with respect to the amounts paid during the interim.
3. This proceeding is held in abeyance, regarding the issue raised in the petition to reopen only, pending final resolution of the issues in Western Coal Traffic League, Docket No. FD 35506.
4. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

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<sup>3</sup> See AEPCO Petition 3.